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No. 89-1298

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE*

The National Employment Lawyers Association (hereafter NELA) is a non-profit organization consisting of over 800 lawyers in forty-nine states. NELA's members concentrate in the representation of individual employees in employment and labor matters. Members of NELA are active in litigating abusive employee discharge claims like that of Respondent throughout the nation. NELA is vitally interested in the outcome of this critical case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of civil liberties and civil rights. Based on those principles, the ACLU has encouraged the development of both substantive and procedural limitations on the common law doctrine of employment-at-will. The decision below furthers the development of such limitations and therefore raises issues of organizational concern to the ACLU.

STATEMENT OF THE CASE

NELA and ACLU adopt the statement of the case as presented by Respondent.

ISSUE

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, preempts a state common law claim that an employer has unlawfully discharged an employee in order to avoid contributing to or paying benefits under the employee's pension fund.

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*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Absent a clear and unmistakable Congressional intent to preempt state law, a federal statute may not eviscerate state remedies for wrongful termination of the employment relationship. While Congress intended the scope of ERISA's express preemption provision to be broad, that scope is not unlimited. Rather, ERISA preempts only those state laws that both relate to employee benefit plans *and* purport to regulate, directly or indirectly, the terms and conditions of those plans. Congress intended that preemption would ensure that the administrative practices of a benefit plan will be governed by only a single set of regulations, and preemption is appropriate only when that intent is served. Because the Texas law does not purport to regulate Petitioner's pension plan, nor does it subject the plan to a different set of administrative practices, it is not preempted.

ARGUMENT

I. Absent A Clear And Unmistakable Congressional Intent To Preempt State Law, A Federal Statute May Not Eviscerate State Remedies For Wrongful Termination Of The Employment Relationship.

Preemption analysis begins with the settled concept that all presumptions operate against preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), which rests on "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As Chief Justice Rehnquist has explained, "unless the requisite preemption intent is abundantly clear, we should hesitate to invalidate state and local legislation . . . ." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J. dissenting). This hesitancy to displace state law is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987); *Massachusetts v. Morash*, __ U.S. __, 109 S.Ct. 1668, 1675 (1989).

This Court has long preserved states' rights to enforce common law remedies, especially in the labor context. *See, e.g., Belknap v. Hale*, 463 U.S. 491, 509 (1983) (state fraud and contract claims not preempted by the National Labor Relations Act); *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966) ("state remedies have been designed to compensate the victim . . ."). As this Court emphasized in *Fort Halifax Packing Co., supra*, 482 U.S. at 21, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State."

Indeed, " 'where . . . the field which Congress is said to have preempted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be *'clear and manifest.'* " *English v.*

General Electric Company, __ U.S. __, 58 U.S.L.W. 4679, 4681 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (emphasis added). "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has *unmistakably* so ordained.' " *Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 422 (citations omitted) (emphasis added). This Court therefore requires that the party urging preemption meet a very high burden of proof indeed.

Following this principle, this Court has held that state law is preempted when one of three tests is satisfied.

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Preemption fundamentally is a question of congressional intent . . ., and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
>
> Second, *in the absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.
>
> * * *
>
> Finally, state law is preempted to the extent that it actually conflicts with federal law.

English v. General Electric Company, supra, at 4681 (citations omitted) (emphasis added).

II. The Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, Preempts Only Those State Laws That Both Relate To Employee Benefit Plans And Purport To Regulate, Directly Or Indirectly, The Terms And Conditions Of Those Plans.

Section 514 of ERISA, 29 U.S.C. § 1144, contains the explicit statutory language that allows the Court to proceed with an analysis under the first test in *English* and to dispense with an analysis under the "field" theory of the second test. *Id.* (citing *Shaw v. Delta Airlines, Inc., supra*). Section 514 provides in pertinent part:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Section 514 has been described as a "virtually unique preemption provision." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Under it, a "State law" is preempted if it " 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 96-97. This broad language, however, is limited in several ways. First, it is limited by the exceptions contained in Section 514(b). *See, e.g., Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). In addition, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 100 n.21.

Finally, the otherwise broad scope of this express preemption clause is further narrowed by Section 514(c), which defines "State law" as the "laws . . . of any State," and which defines a "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.*" (emphasis added). Therefore, in order for a law to be a "State law" within the scope of Section 514(a), the law must "purport to regulate" ERISA plans.[1] At its broadest then, ERISA preempts only those laws that both "relate to" *and* "purport to regulate" ERISA plans. *See Stone & Webster Engineering Corporation v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd sum. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 and n.1 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Teper v. Park West Galleries, Inc.*, 427 N.W.2d 535, 545 (Mich. 1988) (Riley, C.J., concurring).

[1] Just as the Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987), refused to read the word "plan" out of the statute, so should the statute's definitions of "State" and "State law" be given their intended life, particularly since they are included within the very section containing the express preemption clause.

In addition to the statute's plain language, the extensive legislative history cited by Petitioner (Pet. Brief 32-35) fully supports this two-prong test and the conclusion that Section 514 was intended to prohibit state *regulation* of benefit *plans*. For example, Representative Dent spoke of "the reservation to Federal authority [of] the sole power to *regulate* the field of employee benefit *plans* [and the need to apply] this principle in its broadest sense to foreclose any non-Federal *regulation* of employee benefit plans." 120 Cong. Rec. 29197 (1974), *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History")* (Comm. Print 1976) at 4670-4671 (emphasis added). Senator Williams, in addressing the need for the preemption clause, spoke of "eliminating the threat of conflicting or inconsistent State and local *regulation* of employee benefit *plans*." *Id.* at 4746 (emphasis added). And Senator Javits concluded his remarks by commenting:

> Although the desirability of further *regulation* — at either the State or Federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and *the interests of uniformity with respect to interstate plans required* — but for certain exceptions — *the displacement of State action in the field of private employee benefit programs.*

Id. at 4770-4771 (emphasis added).

This Court, in analyzing whether ERISA preempts a state law, has repeatedly stated that "as in any preemption analysis, 'the purpose of Congress is the ultimate touchstone.' " *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 474 (1985)). In *Fort Halifax*, the Court, relying in substantial part on the legislative history cited above, examined this purpose and stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex *administrative activities.* A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. *Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.*

Id. at 11 (citation omitted) (emphasis added). Therefore, the Court concluded that preemption of a state law must further the purpose of ERISA preemption. *Id.* at 15.

Although *Ft. Halifax* and other prior opinions of this Court have not expressly incorporated the "purports to regulate" language of Section 514(c) within their reading of Section 514(a), the conclusion that the "purports to regulate" language establishes the outer bounds of ERISA preemption flows from and is consistent with these decisions. In *Alessi, supra,* the Court struck down a state law that would have affected the amount of benefits provided in ERISA-covered plans and the manner in which those benefits were calculated. State regulation of this type strikes at the heart of plan administration. Similarly, in *Shaw, supra,* the state law preempted also involved an attempt to mandate what benefits would be included in ERISA-covered plans.

In both *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987), and *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41 (1987), each plaintiff brought common law causes of action alleging improper processing of a claim for benefits under an employee benefit plan.[2] Because the state laws involved efforts to have state courts assume the ultimate responsibility for claims processing, they were clearly impermissible attempts to regulate the administration of ERISA-covered plans and were properly preempted.[3] And in *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825 (1988), the garnishment law struck down was one that expressly purported to regulate an ERISA plan, while the garnishment law of general application survived the preemption analysis, even though its application plainly had a "connection to" ERISA plans.

The language of the statute, its legislative history, and the prior decisions of this Court all support the conclusion that Congress intended ERISA to displace only those laws that relate to *and* purport to regulate benefit plans. This conclusion gives full effect to the Congressional intent to foster the uniform regulation of benefit plans by preventing state interference in the management and administration of those plans.

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[2] The Court in *Taylor* did not address the question of ERISA preemption of the claims against the employer, since removal jurisdiction was not based upon those claims. *See Taylor v. General Motors Corp.,* 826 F.2d 452 (6th Cir. 1987) (addressing pendent claims on remand). Therefore, the Court's statement in *Taylor* that "Taylor's common law contract and tort claims are preempted by ERISA," *id.* at 62, perhaps inadvertently sweeps too broadly.

[3] Both *Taylor, supra* at 66, and *Dedeaux, supra* at 52–55, also arguably suggest in *dicta* that any state law claim that could be recharacterized as falling within the scope of § 502(a) is preempted. In these cases, however, the common law claims preempted fell within the scope of § 502(a)(1)(B). Therefore, only consideration of the preemptive force of § 502(a)(1)(B) was necessary to the decision of those cases, as any claim within the scope of that subsection necessarily "purports to regulate" an ERISA plan. In fact, the legislative history on which both *Taylor* and *Dedeaux* relied to find a clear manifestation of preemptive intent applies only to claims within the scope of § 502(a)(1)(B). *Taylor* at 65–66; *Dedeaux* at 55 (citing H.R. Conf. Rep. No. 93-1280, p. 327 (1974)). Any broadening of this line of analysis to causes of action other than those within the scope of § 502(a)(1)(B) should take place only if it is consistent with the "purports to regulate" language of § 514(c) and otherwise furthers the purpose of ERISA preemption as described in *Ft. Halifax, supra.* Because Respondent's claim does not fall within the scope of § 502(a)(1)(B), the clear and manifest legislative intent necessary to support a finding of preemption does not exist.

III. ERISA Does Not Preempt A State Common Law That Prohibits An Employer From Discharging An Employee In Order To Avoid Contributing To Or Paying Benefits Under The Employee's Pension Fund.

Applying this standard to the Texas law under attack by Petitioner, it becomes clear that because the law does not purport to regulate an ERISA Plan, it is not a "State law" preempted by Section 514. Far from regulating any terms and conditions of Petitioner's pension fund, the law attempts instead to regulate the employer-employee relationship, an area "within the traditional police power of the State." *Ft. Halifax Packing Co., supra,* 482 U.S. at 21. Under the Texas law, a terminated employee will be allowed recovery when he proves that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *McLendon v. Ingersoll-Rand Co.,* 779 S.W.2d 69, 71 (Tex. 1989). The focus of the employee's claim, therefore, will be the employer's intent in severing the employment relationship. An inquiry into this intent can hardly be said to regulate, either directly or indirectly, the terms and conditions of an ERISA plan.[4] *See, e.g., K Mart Corp. v. Ponsock,* 732 P.2d 1364 (Nev. 1987) (award of extracontractual damages for bad faith discharge of employee to avoid payment of retirement benefits).

The decision to terminate an employee does not implicate any fiduciary duties under ERISA. *Cf., Amato v. Western Union International, Inc.,* 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed,* 474 U.S. 1113 (1986) ("ERISA permits employers to wear 'two hats,' and [ ] they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators . . ."); *see also, Dzinglski v. Weirton Steel Corp.,* 875 F.2d 1075, 1078-9 (4th Cir.), *cert. denied,* 110 S.Ct. 281 (1989); *Hlinka v. Bethlehem Steel Corp.,* 863 F.2d 279, 285 (3d Cir. 1988). Since Section 3(21)(A), 29 U.S.C. Section 1002 (21)(A), defines a fiduciary in part as one who has any discretionary authority or control regarding the management or administration of a benefit plan, the termination of an employee, and an inquiry into the reasons for the termination, do not and will not affect the management or administration of the plan.

Nor, as Petitioner concedes (Pet. Brief at 46 n.12), will the calculation of Respondent's damages, including his lost benefits, if any, interfere in the regulation of the plan. Because the loss of benefits from any wrongful termination, regardless of motive, is nothing more than a consequence of the termination and does not therefore "relate to" the underlying plan, the fact that lost benefits are included as an element of damages to make the employee whole does not trigger preemption. *See, Teper v. Park West Galleries, Inc.,* 427 N.W. 2d 535 (Mich. 1988); *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1349, 1358 (1986) (cited with approval in *Fort Halifax, supra,* 482 U.S. at 12 n.6); *Morningstar v. Meijer, Inc.,* 662 F.Supp. 555 (E.D. Mich. 1987); *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27 (D. Conn. 1988); *cf., Lingle v. Norge Division of Magic Chef, Inc., supra,* 486 U.S. at 413 n.12. To hold otherwise would preempt every wrongful termination action, regardless of the underlying public policy supporting it, in which the employee claimed lost benefits as an element of damages. There is simply no evidence of a Congressional intent, let alone clear, manifest, and unmistak-

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[4] While Petitioner's pension plan may contain information, such as a vesting schedule, that may provide circumstantial evidence of the employer's intent, this fact alone does not involve the regulation, direct or indirect, of the plan, and would be insufficient to trigger preemption. *Cf. Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 413 n.12 (1988) ("although federal law would govern the interpretation of [a collective bargaining] agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand."). Moreover, that Petitioner may have ultimately allowed Respondent's pension to vest only underscores the fact that his cause of action does not purport to regulate the terms and conditions of the plan.

able evidence, to support such a sweeping application of the preemption clause.[5]

Finally, in the highly speculative event that the Texas law might, by the circuitous process envisioned by Petitioner (Pet. Brief at 36-41), affect Petitioner's plan, these effects are no less tenuous, remote, and peripheral than those rejected by the Court in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). There, the majority was apparently unpersuaded by the dissent's claim that "[c]ompliance with the state garnishment procedures subjects the plan to significant administrative burdens and costs." *Id.* at 842. It is particularly significant that the majority reached its conclusion without quarreling with the dissent's claim that:

> Petitioners are required to confirm the identify of each of the 23 plan participants who owe money to respondent, calculate the participant's maximum entitlement from the fund for the period between the service date and the reply date of the summons of garnishment, determine the amount that each participant owes to respondent, and make payments into state court of the lesser of the amount owed to respondent and the participant's entitlement. Petitioners must also make decisions concerning the validity and priority of garnishments and, if necessary, bear the costs of litigating these issues. Further, as trustees of a multiemployer plan covering participants in several States, petitioners are potentially subject to multiple garnishment orders under varying or conflicting state laws. It is apparent that these effects of garnishment laws on employee benefit plans are not tenuous, remote, or peripheral, and that such laws are accordingly pre-empted.

[5] To the extent that Respondent sought lost benefits in a lump sum from his employer as an element of damages, Amici disagree with footnote 3 of the Texas Supreme Court's opinion. That an employee has sought lost benefits in a lump sum as an element of damages should have no bearing on the preemption analysis for the reasons stated above.

Id. If anything, the burdens and costs hypothesized by Petitioner are less severe than those feared by the dissent in *Mackey*. Moreover, Petitioner's speculation is no substitute for the clear, manifest, and unmistakable showing required to meet its burden of proof. Accordingly, preemption would in no way address the concerns of ERISA's preemption provisions, and ERISA does not preempt Respondent's state law claim.

IV. That The Facts Of This Case May Have Also Provided Respondent With A Cause Of Action Under Section 510 Of ERISA Is Insufficient To Support A Finding Of Preemption.

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." Section 502(e)(1), 29 U.S.C. § 1132(e)(1), gives the federal courts exclusive jurisdiction over Section 510 claims.

Respondent may very well have been able to state a claim under Section 510. Nonetheless, this possibility provides no basis for the conclusion that his state law claim is preempted by ERISA. Any conclusion that Sections 510 and 502(e) together preempt the Texas law would have to rest on an analysis that Congress has not only expressly preempted the field of pension plan regulation, but that it has also implicitly preempted a field of wrongful termination law. This analysis, however, is precluded by Section 514's express preemption provision. *See, English v. General Electric Company*, __ U.S. __, 58 U.S.L.W. 4679, 4681 (1990) ("*in the absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.") (emphasis added); *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989).

Moreover, ERISA has been described as "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). Because the express language of Section 514 cannot be read to preempt Texas law, in "a comprehensive regulatory scheme like ERISA, such omissions are significant ones." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988). *Cf. Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147 (1985).

Finally, no conflict exists between the Texas law and Section 510. "[O]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *English v. General Electric Co., supra*, 58 U.S.L.W. at 4684 (quoting *California v. ARC America Corp.*, 109 S.Ct. 1661, 1667 (1989)). While "every subject that merits congressional legislation is, by definition, a subject of national concern . . . [, this] cannot mean, however, that every federal statute ousts all related state law . . . ." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). In *Decanas v. Bica*, 424 U.S. 351, 356 (1976), this Court recognized that "states possess broad authority . . . to regulate the employment relationship to protect workers within the State." Preempting the Texas law, where Congress has declined to provide for it within an express preemption clause, would frustrate this principle and needlessly impair the state's ability to protect the employer-employee relationship.

CONCLUSION

Wherefore, Amici respectfully urge this Court to affirm the judgment below.

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